STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2005
V	No. 254492 Macomb Circuit Court
JOSEPH JOHN LEONARD, Defendant-Appellant.	LC No. 2003-002893-FC

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assault with intent to murder, MCL 750.83. The trial court sentenced defendant to a minimum of 135 months and a maximum of 20 years in prison. We affirm.

This case arises from defendant's attack on the victim, Paula Primm. After finding drugs and drug paraphernalia in her home, the victim told defendant, to whom she was renting a room in her home, to leave the premises. Defendant attacked Primm, tied her up in a back room, and beat her for some time, fracturing bones in her face and causing other injuries. Defendant admitted that he beat Primm, but denied that he intended to kill her.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree. "In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). "Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime." *Id*.

"The elements of the crime of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Elements of the crime may be proven by "[c]ircumstantial evidence and the reasonable inferences that arise from the evidence." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "Because of the difficulty of proving an actor's state of mind," intent to kill may be proven "by inference from any facts in evidence" and only "minimal circumstantial evidence." *Id.* All conflicts must be resolved in the prosecution's favor, and weight or credibility is solely for the jury to decide. *Id*.

In *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), this Court concluded that there was sufficient evidence from which a defendant's intent to kill could be inferred, where the evidence established that defendant severely and repeatedly beat a victim and allowed a dog to bite the victim while the victim was incapacitated. Similarly, in this case the evidence established that defendant incapacitated Primm and beat her for an extended period of time while she was incapacitated. Furthermore, "threats with a show of force and an unlawful condition constitute sufficient evidence from which a jury could infer intent to injure," and even "a qualified threat or conditional intent is sufficient to establish assault with intent to kill." *People v Vandelinder*, 192 Mich App 447, 451; 481 NW2d 787 (1992). Here, there was evidence that defendant attempted to avoid detection during his attack of Primm by tying her up and moving her to a back room, and that during the attack he cut her and threatened to kill her. We conclude that a jury could reasonably have inferred from the facts that defendant intended to kill Primm, and thus, there was sufficient evidence to support defendant's conviction.

Defendant next alleges that his trial counsel was ineffective by failing to request jury instructions on lesser offenses and failing to impeach key prosecution witnesses with prior inconsistent statements. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and questions of law are reviewed de novo. *Id*. To show that counsel has been ineffective, a defendant must establish that counsel's performance was deficient and that there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). Defendant did not move for a new trial or for an evidentiary hearing in the trial court, so appellate review is limited to the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). On the basis of the record before us, we do not find that defendant's trial counsel was ineffective.

We first reject defendant's argument that trial counsel should have requested jury instructions on lesser offenses. Defendant alleges that trial counsel's "all or nothing" strategy was doomed to failure in light of his admission that he beat Primm severely. Thus, he argues trial counsel should have requested instructions on lesser offenses such as assault with intent to do great bodily harm, aggravated assault, and assault and battery.

Even if assault with intent to do great bodily harm less than murder is a necessarily included lesser offense of assault with intent to commit murder, see *People v Brown*, 267 Mich App 141, 151; 703 NW2d 230 (2005), thus requiring the trial court to give the instruction if the defense had requested it, it is not axiomatic that trial counsel acted unreasonably in not seeking a lesser offense instruction on assault with intent to do great bodily harm. There is a strong presumption that counsel's performance was sound trial strategy. *Matuszak*, *supra* at 58. Given her injuries, there was overwhelming evidence that defendant assaulted Primm with at least the intent to do great bodily harm. The evidence concerning defendant's intent to kill was not as dramatic and overwhelming, and we conclude that trial counsel could reasonably have determined that it better served defendant's interests to pursue an "all or nothing" strategy to try to win outright acquittal rather than to request an instruction on assault with intent to do great bodily harm that would have virtually guaranteed defendant's conviction of a serious felony. Thus, defendant has not shown that counsel's performance was deficient in this regard. *Matuszak*, *supra* at 57-58.

Moreover, given the evidence of Primm's injuries, trial counsel could reasonably have concluded that no juror would have found the evidence supported a conviction of assault or aggravated assault, and that such an instruction request could only antagonize the jury. Trial counsel could also have reasonably concluded that the request for instructions on assault and aggravated assault would have invited the prosecution to request an instruction on assault with intent to do great bodily harm, thereby undermining his reasonable "all or nothing" strategy. Thus, on the record before us, defendant has not established that he received ineffective assistance in this regard.

Defendant also argues that trial counsel was ineffective for failing to impeach prosecution witnesses with prior inconsistent testimony. Trial counsel's decision regarding what evidence to present is presumed to be trial strategy that will not be second-guessed on appeal with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Because we find the alleged inconsistencies minor or nonexistent, we cannot say that trial counsel was ineffective for failing to nitpick these points before the jury. Defendant likewise argues that trial counsel was ineffective for failing to obtain an expert medical witness for the defense, but the record does not provide any support for the conclusion "that an expert witness would have testified favorably if called by the defense." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant also argues that trial counsel should have specifically asked Dr. Sweeney if the cuts on Primm's face were caused by surgical procedures, but given Primm's testimony that the cuts she received were minor and Dr. Sweeney's testimony that Primm required extensive facial surgery, the jury would have been able to evaluate this issue from the existing testimony. Because the record contains no proof that a defense medical expert would have benefited defendant, trial counsel was not ineffective for electing not to retain one.

Defendant argues several other unmeritorious reasons why trial counsel was ineffective. We merely note that we are loath to second-guess trial counsel's strategic decision to downplay a defendant's prior conduct, *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999), and that the "failure to raise every conceivable issue does not constitute ineffective assistance of counsel." *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). Defendant has not shown "a reasonable probability that the outcome would have been different" if trial counsel had pursued a different strategy as now urged by *Ackerman*, *supra* at 455.

Defendant also contends that the trial court abused its discretion by ordering him to accept his second appointed attorney or represent himself. We disagree. An indigent defendant who accepts appointed counsel is entitled to have his assigned lawyer replaced only upon a showing of good cause. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). The record fails to establish good cause to replace trial counsel, and the trial court correctly denied defendant's request.

Defendant also alleges that the trial court was biased. However, defendant does not raise this issue in his statement of questions presented, so we need not review it. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). However, we note briefly that defendant's trial counsel and defendant personally stated in the trial court that they wished to proceed after the lower court judge explained that he had previously represented Primm in "a criminal matter that was dismissed . . . over 10 years" previously. Even if the matter was properly presented, a party may not agree to something and then allege on appeal that it was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Thus, defendant has waived this issue.

In a supplemental brief, defendant argues in propria persona that the prosecutor engaged in misconduct by improperly soliciting other acts evidence from Primm and by improperly placing the burden of proving self-defense on defendant. Because defendant failed to preserve these assertions of prosecutorial misconduct, we review these claims for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id*., quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]). We find no plain error affecting substantial rights.

Primm testified that defendant told her he had been incarcerated previously and had to kill her because he did not want to be incarcerated again. The evidence was relevant to show defendant's motive or intent to kill Primm, and Primm's testimony about the statement in question was not improper. *People v Rice*, 235 Mich App 429, 439-440; 597 NW2d 843 (1999).

To the extent that defendant alleges it was improper for the prosecutor to remark on the statement during closing argument, the trial court instructed the jury that lawyers' statements were not evidence, and defendant has not provided any suggestion that there exists "an 'overwhelming probability' that the jury [was] unable to follow the court's instructions." *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001), quoting *Greer v Miller*, 483 US 756, 767 n 8; 107 S Ct 3102; 97 L Ed 2d 618 (1987). As for defendant's assertion that Primm's testimony improperly shifted the burden of proving self-defense on defendant, there is no indication that defendant actually pursued a self-defense theory at trial. Thus, we find it unnecessary to address any of defendant's arguments on appeal regarding self-defense.

Defendant also argues that the prosecutor committed misconduct by testifying to facts not in evidence. Prosecutors' remarks should not be considered out of context. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). Our reading of the record is that the prosecutor accurately recounted testimony surrounding defendant's actions immediately after the incident and drew the reasonable inference that defendant was fleeing the scene of a crime that could have left Primm dead. The prosecutor is not required to do so in the blandest possible manner. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).

Defendant next argues that he was denied his right to a fair trial and to confront witnesses by the trial court's refusal to allow him to recall prosecution witnesses for impeachment. We disagree.

A trial court's decision whether to admit evidence is generally discretionary, but preliminary legal questions are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). We also review de novo issues concerning due process violations, *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001), and Confrontation Clause challenges. *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000). The scope of cross-

examination is discretionary with the trial court, but "that discretion must be exercised with due regard for a defendant's constitutional rights." *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985). However, defendants are not entitled to unlimited cross-examination. *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998). That right does not extend to irrelevant issues and may be overridden by other concerns. *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Such concerns include "'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986). "Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness' testimony." *Id*.

Much of defendant's argument is based on preliminary examination testimony, but defendant has not provided a preliminary examination transcript. Thus, this appears to be an impermissible attempt to enlarge the record and to present an issue without a required transcript. *Warren*, *supra* at 356; *People v Coons*, 158 Mich App 735, 739-740; 405 NW2d 153 (1987). In any event, presuming the discrepancies exist as defendant has stated them, any restriction on cross-examination that precludes a defendant from impeaching a witness with prior inconsistent statements is subject to harmless error analysis. *People v Adamski*, 198 Mich App 133, 140; 497 NW2d 546 (1993). Neither the right to confrontation nor due process precludes a trial court from exercising its discretion to deny cross-examination on "collateral matters bearing only on general credibility" or "irrelevant issues." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The essential disputed issue at trial was whether defendant intended to kill Primm at the time of the beating, and none of the alleged inconsistencies touch on that issue. The alleged inconsistencies, if they exist, are at most "collateral matters bearing only on general credibility." *Id*. Therefore, the trial court had the discretion to limit cross-examination regarding those issues. Upon analysis of the alleged inconsistencies, we further conclude that "an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for" concluding that the discrepancies, if any, were not serious enough to warrant recalling Harms for further cross-examination. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

Defendant next alleges that the prosecution's expert medical witness should not have been permitted to testify as an expert witness under MRE 702, 703, and 403. A trial court's decision regarding an expert witness's qualifications is reviewed for an abuse of discretion. *People v Hawthorne*, 293 Mich 15, 23; 291 NW 205 (1940). However, because this issue is unpreserved, review is for plain error affecting substantial rights. *Carines*, *supra* at 763. While we find plain error, we conclude that it did not affect defendant's substantial rights.

Under MRE 702, "[a]n individual must be qualified by "knowledge, skill, experience, training, or education" to testify as an expert witness." *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995). Defendant conceded Dr. Sweeney's qualifications, and we agree that he was properly qualified. However, MRE 703 requires that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Dr. Sweeney explained that his opinions were based on reviewing the hospital's records and on discussions he had with the doctors directly involved in treating Primm. There is no indication that the hospital records were ever admitted into evidence, and the doctors with whom Dr.

Sweeney discussed Primm did not testify as fact witnesses. Thus, Dr. Sweeney's opinions were apparently impermissibly based on hearsay, which is not allowed under MRE 703.

However, defendant did not object to Dr. Sweeney's testimony. Indeed, defendant questioned Dr. Sweeney on the basis of the same impermissible evidence and established several facts in defendant's favor, including the existence of heroin in Primm's blood, a lack of injury to Primm's skull or vital organs, a lack of stab wounds, a lack of any indication that Primm lost an unusually large amount of blood, and the fact that the lacerations Primm received could have come from fingernails rather than a knife. Furthermore, there was already considerable evidence that defendant inflicted substantial injury on Primm. Thus, although admission of the testimony constituted plain error because it was clearly inadmissible as a matter of law, the error did not "result[] in the conviction of an actually innocent defendant" or "'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.'" *Carines, supra* at 763, quoting *Olano, supra* at 736-737 (quoting *Atkinson*, *supra* at 160). Further, we do not believe this testimony was misleading under MRE 403.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder